UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re:

Amare Gurmu Solomon,
Debtor.

BKY 12-33993

Amare Gurmu Solomon,

Plaintiff,

vs.

Student Loan Finance Corporation,
Education Loans Incorporated and
GOAL Funding II, Inc.,

Defendants.

ADV 12-3276

NOTICE OF HEARING & MOTION

TO: Student Loan Finance Corporation, Education Loans Incorporated and GOAL Funding II, Inc. and their attorneys Fruth, Jamison & Elsass, PLLC, Adam A. Gillette and Lori A. Johnson, 3902 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402.

1. The court will hold a hearing on this motion at 2:00 p.m. on June 13, 2013 in Courtroom 2A, Warren E. Burger Federal Building and U.S. Courthouse, 316 North Robert Street, St. Paul, MN 55101 before Judge Gregory F. Kishel.

2. Any response to this motion must be filed and served not later than June 7, 2013, which is five days before the time set for the hearing (including Saturday, Sundays and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

3. This court has jurisdiction over this motion pursuant to 28 *U.S.C.* §157 and §1334, *Federal Rule of Bankruptcy Procedure* 5005 and *Local Rule* 1070-1. This proceeding is a core proceeding.

4. This motion arises under 11 *U.S.C.* §523(a)(8), *Federal Rule of Civil Procedure* 56 and *Bankruptcy Rule* 7056. This motion is filed under *Bankruptcy Rules* 9013 and 9014 and *Local Rule* 9013.

5. Movant requests he be granted summary judgment determining that the claim of defendants is dischargeable. Plaintiff and defendants have agreed to a Stipulated Statement of Facts to apply only for the purpose of determining whether or not summary judgment should be granted as requested herein.

6. Defendants' claim is based upon three applications and notes referenced in the Stipulation. For the purposes of this Motion only it will be assumed that these notes were executed by Samuel Bankole. Copies of the notes stipulated to are appended to the parties' Stipulated Statement of Facts. Defendant Student Loan Finance Corporation is servicer for the stipulated loans. The present holders of the notes are defendants Education Loans Incorporated and GOAL Funding II, Inc. These notes on their face list the recipient school for the funds loaned as the University of Minnesota/Twin Cities. On these applications and notes plaintiff is listed as co-signer. Mr. Bankole is an acquaintance of plaintiff; they are not related by blood or marriage. The notes do not provide that plaintiff will receive any proceeds

or other consideration from the loans described.

7. Defendants have argued that their claim is not dischargeable because it is excepted from discharge under 11 U.S.C. §523(a)(8). For the reasons stated in the accompanying Memorandum, plaintiff submits that the exception to discharge of §528(a)(8) does not apply to defendants' notes.

WHEREFORE, plaintiff requests summary judgment determining that defendants' claims are dischargeable.

Dated: May 15, 2013.

TWIN CITY ATTORNEYS, P.A.

/e/ James C. Whelpley

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ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A hearing on Plaintiff's Motion for Summary Judgment was held before the undersigned on June 13, 2013. Appearances were noted in the record.

Now, based upon the argument of counsel and on all the files, records and proceedings herein,

IT IS HEREBY ORDERED THAT the claims of Defendants against Plaintiff are not excepted from discharge under 11 U.S.C. §523(a)(8).

Dated: ______________, 2013.

____
Gregory F. Kishel
United States Bankruptcy Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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Amare Gurmu Solomon,

Plaintiff,

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Defendants.

ADV 12-3276

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

FACTS

At issue for this motion are three student loans made to Samuel A. Bankole in June through October, 2003. Mr. Bankole was an acquaintance of plaintiff at the time the loans were made. Plaintiff and Mr. Bankole are not related. Mr. Bankole received all the proceeds; Plaintiff received nothing. The notes provide that the proceeds will only be used for Mr. Bankole's educational expenses at the University of Minnesota.

For the purposes of this motion only it will be assumed that plaintiff signed the three notes in question as "Cosigner 1" at some time prior to the actual distribution of funds to Mr. Bankole.

LAW

Summary Judgment. Rule 56(a) of the Federal Rules of Civil Procedure, incorporated into bankruptcy practice by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment shall be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Federal Rule of Civil Procedure* 56(a). A party asserting "that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of material in the record ...; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Federal Rule of Civil Procedure* 56(c)(1).

"Rule 56(a) specifies that to preclude summary judgment, the fact in dispute must be material. Substantive law determines the facts that are material." *Cordius Trust v. Kummerfeld* (In re Kummerfeld), No. 09 B 16267(AJG), Adv. No. 10–2841(AJG), 2011 WL 108339, at p. 9 (Bankr.S.D.N.Y.2011) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "If a fact is material, it is necessary to see if the dispute about that material fact is genuine, 'that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " Id. (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505). "If the fact may be reasonably resolved in favor of either party, then there is a genuine factual issue that may only be resolved by the trier of facts and summary judgment will be denied." Id. (citing *Anderson v. Liberty Lobby*, 477 U.S. at 250, 106 S.Ct. 2505). "If, however, the evidence 'is so one-sided that one party must prevail as a matter of law,' then summary judgment will be granted." Id. (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 251–52, 106 S.Ct. 2505).

The parties agree that any liability of plaintiff to the defendants can only be founded on plaintiff's obligation as an accommodation party in three notes signed by a student borrower. Although plaintiff denies that he signed these notes or otherwise assented to their terms and denies that there was any consideration expressed, it must be assumed for this summary judgment motion that plaintiff signed notes which were facially valid under applicable non-bankruptcy law.

Although plaintiff also argues factual matters preclude any liability on the notes, summary judgment can be granted because any obligation of plaintiff has been discharged. He submits the discharge exception of 11 U.S.C. §523(a)(8) does not apply to him as a non-student cosigner who receives nothing from the proceeds of instruments styled as student loans.

Discharge Exception of 11 U.S.C. §523(a)(8) Does Not Apply to the Three Notes.

There is apparently no authority at the eighth circuit level on the dischargeability of a co-borrower on a student loan. However, courts in this circuit and elsewhere have ruled that such co-borrower guaranties could be discharged.

Cases have cited two reasons for allowing co-borrowers to discharge student loans they guarantied. They have cited legislative history leading to the enactment of 11 U.S.C. §523(a)(8) and they have held that the loans are not educational loans of the co-borrowers.

Legislative History. Beginning with *In Re Boylen*, 55 B.R. 459 (N.D. Ohio 1985) courts have held that Congress never intended the student loan discharge exception to apply to co-borrowers. *Boylen* noted that the debtor

> "was only a co-maker on the debt and never was a student. Based on the Legislative History and the remarks of various congressmen relative to this exception to discharge, this Court finds that the United States Congress intended that this exception be applicable only to the student debtor and not to any co-makers on the debt." *Id.*, at p.925.

The Court added that

> "as noted by the Sixth Circuit Court of Appeals in *Roth Steel v. Sharon Steel,* 705 F.2d 134, Nos. 80–3702/3748 (6th Cir. April 8, 1983), 'The language of a statute must be given its plain meaning, unless the intent of the legislature or the purposes served by the statute would be frustrated by such an interpretation.' *Id.* at 152. Upon an examination of the Legislative History, this Court finds that Congress' intent and

> the purposes for which this exception to discharge was enacted would be frustrated if this debt were found to be nondischargeable as against debtor, John Boylen."

Boylen then detailed the fairly extensive legislative history:

> "the legislative history is extensive, providing pages of debate and pages of congressional comments along with letters from individuals both in support of and opposing this exception to discharge. In particular, comments of Representative Cornell indicate that the intent of this Amendment is to prevent the abuse of the student loan program by those who, upon graduation, have but one debt, that being the student loan debt, and then seek to obtain a fresh start by filing bankruptcy upon graduation. 124 Cong.Rec., *supra.* at 466 (Remarks of Rep. Ertel).
>
> "The legislative history further indicates the reason that Congress felt that student loans should be treated differently than other debts is due to the fact that when the average creditor determines to extend credit to an individual, it generally relies upon collateral owned by the debtor or upon the good credit rating of the debtor. In the case of a student loan, however, most students have no credit rating or collateral to pledge as security against the student loan debt. Accordingly, in extending the student loan, the collateral relied upon is the intangible collateral of that student's ability to make a better living after graduation so that he will be in a position to satisfy the student loan debt. *Id.,* 124 Cong. Rec., *supra.* at 468 (remarks of Rep. Erlenborn).
>
> "Throughout the legislative history, the reference is always to the student. In opposing the amendment, Representative Dodd noted that this bill would affect ten million students solely due to the fact that they are students in need of financial assistance to get through school. 124 Cong. Rec., *supra.* at 467. At no point does the legislative history refer to this debt being non-dischargeable as against co-makers or co-debtors liable on the debt. Instead, the legislative history makes reference to the fact that co-makers are generally not required on these debts. H.R.Rep. No. 95–595, 95th Cong. 1st Sess. 133 (1977)."
>
> "As set forth in the Report of the Committee on the Judiciary for H.R. 8200,
>
>> 'a few serious abuses of the bankruptcy laws by debtors with large amounts of educational loans, few other debts, and well-paying jobs, who have filed bankruptcy shortly after

> leaving school and before any loans became due, have generated the movement for an exception to discharge. H.R.Rep. No. 95–595, *supra.* at 133, U.S. Code Cong. & Admin. News 1978, p. 6094.' " *Id.*, at p. 926.

Boylen then argued that the co-borrower debtor was not the type of debtor Congress targeted in §523(a)(8),

> "Debtor, John Boylen, is a far cry from the debtor about whom this exception to discharge was drafted. This debtor has received no benefit from the student loan debt in question. It was not he but his former wife, Lucille Boylen, who received the education. Moreover, he does not even have the benefit of a higher family income due to Mrs. Boylen's education because of the fact that the parties are now divorced. The Court finds that Congress had no intention to except a co-maker's liability on a student loan debt from discharge. Such an exception would be utterly contrary to the fresh start pervasive throughout this Bankruptcy Code and the Bankruptcy Act of 1898 and the purposes for which this exception was enacted. *Id.*, at p. 926-927.

In re Zobel, 80 B.R. 950, 951-952 (N.D. Iowa 1985) backed the Boylen argument noting the history of §523(a)(8),

> "Throughout the legislative history, the reference is always to the student ... At no point does the legislative history refer to this debt being nondischargeable as against co-makers or co-debtors liable on the debt. Instead, the legislative history makes reference to the fact that co-makers are generally not required on these debts. H.R.Rep. No. 95–595, 95th Cong. 1st Sess. 133 (1977), U.S.Code Cong. & Admin.News 1978, p. 5963, 6094."

In re Washington, 41 B.R. 211, 214 (E.D. Va. 1984) made a similar analysis,

> "This inquiry involves more particularly whether, as to the debtors, the obligation is an 'educational loan' and if it is, whether either of the exceptions to nondischargeability exist in this case. ... A threshold issue, however, for this Court is whether

> co-makers who are not students and did not directly benefit by the making of the educational loan are covered by the provisions of § 523(a)(8). Stated differently, the issue is whether as to these particular debtors the loan is indeed an 'educational loan.' "

This case then referenced the specific legislative history:

> "The legislative history provides clearly that the student loan exception was intended to treat 'students' differently than other debtors. 29 B.R. at 926 [Boylen]. Congress was unwilling to grant students the same discharge as other debtors where that student took out educational loans and then attempted to discharge those obligations after completing one's education.
>
> "What [this provision] does prevent is that when a student gets through school, having taken a student loan, comes out, and says, 'Well, it is nice to get a fresh start. I will not pay back my loan. I will declare bankruptcy and I will not have to worry about it.' And discharge the only loan they have which is a student loan. 124 Cong. Rec. H. 466 (daily ed. Feb. 1, 1978) (comments of Cong. Ertel). Thus, to conclude that non-student co-makers are covered by § 523(a)(8) would expand the coverage of that provision to parties not contemplated by Congress in enacting the new Bankruptcy Code." Id., at p. 214.

In re Meier, 85 B.R. 805 (W.D. Wis. 1986) expatiated on the framework for use of legislative history in a student loan co-borrower case,

> " '[E]xceptions to the dischargeability of a debt are construed strictly against the creditor's objections and liberally in favor of a bankrupt.' *In re Green,* 5 B.R. 247, 249 (Bankr. N.D. Ga.1980). In determining whether a particular debt falls within one of the exceptions of section 523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor. Any other construction would be inconsistent with the liberal spirit that has always pervaded the entire bankruptcy system. King, *Colliers on Bankruptcy* § 523.05A (15th ed. 1979)."

Meier then applied this construct to the legislative history of §523(a)(8),

> "The educational loan exception to discharge was enacted to prevent abuses of the Bankruptcy Code. Students were filing for

> bankruptcy shortly after leaving school and before they had reaped the benefits of the high paying jobs their student loans enabled them to obtain. H.R. Rep. No. 595, 95th Cong., 1st Sess. 133 (1977), U.S. Code Cong. & Admin. News 1978, p. 5787. Certainly, if the § 523(a)(8) exception was designed to prevent such abuses, then it was not intended to apply to an accommodation party who has received no benefit from the proceeds of the loan." *Id.*, at pp. 806-807.

In re Kirkish, 144 B.R. 367, 369 (W.D. Mich. 1992) adopted a similar analysis when it held the debt of a student loan co-maker could be discharged,

> "Legislative history suggests Congress was motivated by the idea that *students* who receive the benefit of educational loans should not be able to use the bankruptcy laws to avoid the responsibility of repayment. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 133 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6094. Throughout the legislative history, reference is continually made to potential abuse by student debtors and 'at no point does the legislative history refer to this debt being nondischargeable as against co-makers or co-debtors liable on the debt.' *In re Boylen,* 29 B.R. at 926. Instead, the legislative history alludes to the fact that co-makers are generally not required on educational loans. *Id.* "

A similar line of reasoning was followed in *In re Pryor*, 234 B.R. 716 (W.D. Tenn. 1999).

Co-Borrower Loans Are Not Educational Loans. In *Kirkish* the Court suggested that guaranties of co-makers do not share the attributes of an educational loan,

> "[U]nlike commercial transactions where credit is extended based on the debtor's collateral, income, and credit rating, student loans are generally unsecured and based solely upon the belief that the student-debtor will have sufficient income to service the debt following graduation.' *In re Merchant,* 958 F.2d at 740.

> "Clearly, the purpose of the statute is to except educational loans to students from discharge, and not to parents who are in a different economic position and period of their lives. The co-maker does not have the same motivations as a student fresh out of college with nothing to lose but student loan debt. The parent/co-maker generally has many other debt obligations besides being liable on an educational loan. It is unlikely that a parent will want or be able to exact the same sort of abuses on the educational system as a student recently finished with college or graduate studies." Kirkish, id. at p. 369.

The Meier Court also focused on the differences between the primary educational loan and the secondary guaranty of the co-maker. It said there are two separate obligations, not one:

> "The debtor, as endorser of the promissory note, is an accommodation party to the obligation. *Wis. Stat.* § 403.415. The debtor's ex-husband, as maker, is the 'principal debtor' and is primarily liable on the promissory note. The debtor is a surety of the promissory note and, therefore, has secondary liability. *See Wis. Stat.* § 401.201(40). *See also Official Comment to U.C.C.* § 3–415.
>
> "The obligation of an accommodation party to a contract is substantially different than the obligation of the principal obligor. They are two distinct obligations. It is well settled that the discharge of the principal debtor does not discharge the obligation of the accomodation party. Similarly the obligation party may be discharged without discharging the principal debtor.
>
> "Using the aforementioned principles of statutory interpretation, it is clear that the obligation of an accomodation party to a debtor for a guaranteed student loan should not fall within the exception of § 523(a)(8) of the Bankruptcy Code. The actual 'debt for an educational loan' is that of the principal obligor.
>
> "The principal obligation was the debt intended to be excepted from discharge under § 523. The secondary liability of the accommodation party who received no benefits from the loan proceeds was not expressly excepted from discharge. Therefore, the obligation of the debtor in the case at hand was discharged under the general provisions of § 727.
>
> "This interpretation is also consistent with the expressed

> congressional intent behind § 523. The educational loan exception to discharge was enacted to prevent abuses of the Bankruptcy Code. Students were filing for bankruptcy shortly after leaving school and before they had reaped the benefits of the high paying jobs their student loans enabled them to obtain. H.R. Rep. No. 595, 95th Cong., 1st Sess. 133 (1977), U.S. Code Cong. & Admin. News 1978, p. 5787. Certainly, if the § 523(a)(8) exception was designed to prevent such abuses, then it was not intended to apply to an accommodation party who has received no benefit from the proceeds of the loan." _Meier_, id., at pp. 806-807.

In re Bawden, 55 B.R. 459, 461 (M.D. Alab. 1985) argues that legislative history shows debts of such accommodation parties should not treated as educational loans,

> "The legislative history provides clearly that the student loan exception was intended to treat 'students' differently than other debtors. *In re Boylen,* 29 B.R. at 926. Congress was unwilling to grant students the same discharge as other debtors where the students took out educational loans and then attempted to discharge those obligations after completing their education.
>
> "What [this provision] does prevent is that when a student gets through school, having taken a student loan, comes out, and says, 'Well, it is nice to get a fresh start. I will not pay back my loan. I will declare bankruptcy and I will not have to worry about it.' And discharge the only loan they have which is a student loan. 124 Cong. Rec. H. 466 (daily ed. February 1, 1978, comments of Cong. Ertel)."
>
> "Thus, to conclude that non-student co-makers are covered by § 523(a)(8) would expand the coverage of that provision to parties not contemplated by Congress in enacting the new Bankruptcy Code. Thus, this court agrees with Judge White in *In re Boylen* where he stated:
>
> " '[C]ongress had no intention to except a co-maker's liability on student loan debt from discharge. Such an exception would be utterly contrary to the fresh start pervasive throughout the Bankruptcy Code and the Bankruptcy Act of 1898 and the purposes for which this exception was enacted.' 29 B.R. at 927."

Bawden then reasoned co-maker loans were not educational loans at all,

> "Stated differently, this court views the obligation of the debtor to ACHE as other than an 'educational loan.' The legislative history of § 523(a)(8) and the policy of the Bankruptcy Code lead the court to conclude that a guaranteed student loan is an educational loan only as to a student borrower.
>
> "The legislative history of § 523(a)(8) suggests that conclusion where it is stated:
>
> "First of all, Members should be aware that nothing in the provision of law today on the Ertel amendment [student loan exception to discharge] prohibits the discharge of the non-student loan debt. 124 Cong. Rec. *supra* at 469 (statement by Cong. Erlenborn)" *Id.* at p. 461.

The Court then concluded that from the perspective of the co-maker the loan could not be called an educational loan. It cited other cases and said,

> "if a loan is made under a guaranteed student loan program it must be an 'educational loan.' That is not always the case.
>
> "The mother in this case did not endorse the promissory note for the purpose of furthering her education. Thus, as to the mother, the loan is not an educational loan. For the debt to be nondischargeable as to this debtor (mother), the debt must be both an educational loan and guaranteed by the appropriate authority. The debtor's daughter signed the promissory note for the purpose of paying for her education. Were the daughter to file bankruptcy, the debt would be nondischargeable as to her. The court believes an educational loan should be nondischargeable only in a case filed under Title 11 of the Bankruptcy Code by a student debtor who borrowed money from a qualified lender under a guaranteed student loan program to pay for that student's education.
>
> "Had Congress desired to except from discharge anyone other than the student it could have easily done so. But Congress added the requirement that the debt be an educational loan as well as guaranteed by the appropriate authority. The cases cited by ACHE do not make this distinction between an educational loan and a guaranteed student loan and thus fail to give meaning to all the

> words of the statute.
>
> "In summary, this court holds that the debtor's obligation to the Alabama Commission on Higher Education should be included in the debtor's discharge because the exception to discharge for student loans applies only to student borrowers.
>
> "Nothing in this opinion is to be construed as an impairment of the right of the Alabama Commission on Higher Education to collect the indebtedness from the student borrower." *Id.* at pp. 461-462

In re Washington reached the same conclusion:

> "Stated differently, this Court views the obligation of the debtors to the Authority as not an 'educational loan.' The legislative history of § 523(a)(8) and the policy of the Bankruptcy Code requires a finding that such a loan is only an 'educational loan' as to that party that received the benefits of the loan. Clearly then it is only the student-borrower who is covered by § 523(a)(8). The legislative history of § 523(a)(8) suggests this conclusion where it is stated:
>
> "First of all, Members should be aware that nothing in the provision of law today on the Ertel amendment [student loan exception to discharge] prohibits the discharge of the non-student loan debt. 124 Cong. Rec. *supra* at 469 (statement by Cong. Erlenborn)." *In re Washington*, id., at p. 214.

Finally, it should be noted that the equities argue more strongly for Mr. Solomon than they do for most co-borrowers. Mr. Bankole is not related to Mr. Solomon, they are only acquaintances. The documentation shows plaintiff received no benefit, direct or indirect, from the loan. The loan only benefits Mr. Bankole, the University of Minnesota, the defendants and defendants predecessors in interest.

Dated: May 15, 2013.

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